

Liability and Redress Issues

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Co-Extra
International Conference
Paris, 2-5 June 2009

Starting Point

- GM farming may cause losses ...
 - ▶ in case of admixture with non-GM products
 - + to conventional or organic farmers
 - + to distributors
 - ▶ if a GM product turns out to have negative health effects
 - + to consumers
 - + to food or feed producers
 - ▶ to biodiversity
 - ▶ ...
- Even mere fear of future harm may lead to a loss itself

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Starting Point

- GM farming may cause losses
- Who shall pay the bill?
 - ▶ Traditionally: The loss lies where it falls.
 - ▶ Only if there is good reason to shift the loss onto someone else will the latter have to indemnify the immediate victim
 - ▶ If so, the immediate victim will be satisfied, but what about the payor?

⇒ The potential for harm and the consequences linked to it are crucial determinants of true coexistence.

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Starting Point

- 22 European jurisdictions

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Starting Point

- 22 European jurisdictions
- 5 non-European jurisdictions
- International law

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Starting Point

- Different liability regimes
- Despite common core fundamentally different approaches in detail with effect on outcome:
 - ▶ Compensable loss
 - ▶ Causation
 - ▶ Reason for liability
 - ▶ ...

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Starting Point

- ... and all this overlapped with differing regulatory backgrounds:
 - ▶ tolerance levels
 - ▶ isolation distances
 - ▶ licensing
 - ▶ notification
 - ▶ ...

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Starting Point

- ... and all this overlapped with differing policy objectives:
 - General GMO attitude affects applicable liability regime

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Starting Point

- ... and all this overlapped with potential contractual deviations:
 - Parties may agree on stricter standards than required.

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Efforts to Overcome Diversity

- Harmonization on EC level
 - ▶ EC Products Liability Directive 1985
 - ▶ EC Environmental Liability Directive 2004
 - ▶ Harmonization of rules affecting cross-border litigation

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Efforts to Overcome Diversity

- Harmonization on EC level
 - ▶ EC Products Liability Directive 1985
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 - ▶ Harmonization of rules affecting cross-border litigation
- Harmonization on international level (but only affecting cross-border losses)
 - ▶ CoE Lugano Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment
 - ▶ Cartagena Protocol on Biosafety

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Efforts to Overcome Diversity

Cartagena Protocol on Biosafety

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Efforts to Overcome Diversity

Cartagena Protocol on Biosafety

- ▶ MOP 4 Decision BS-IV/12 on liability and redress
- ▶ Last discussed at a meeting in Mexico City (23-27 February 2009)
- ▶ Yet unclear how it will develop:
 - ◆ optional or binding
 - ◆ administrative vs. civil liability regime
 - ◆ definitions of key elements (e.g. damage)
 - ◆ exemptions
 - ◆ defences
 - ◆ ...

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- **Further harmonization?**

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Further harmonization?

- Degree of harmonization?
- Feasibility of harmonization?
- Desirability of harmonization?
- Where to start?

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State Involvement

- **Problems with equality**
- **Participation of the state by ...**
 - ▶ creating a regulatory environment which clearly defines the standard of care
 - ▶ supporting the insurance industry by
 - ◆ creating demand by requiring insurance
 - ◆ backing up risks exceeding certain limits
 - ▶ installing compensation funds at least temporarily until the insurance industry can take over
 - ▶ ...

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Outlook

- Tort law can offer solutions, but do we want them?
- The insurance industry does not yet seem to be prepared to step in.
- In a comparative perspective, existing approaches are diverse and lead to different outcomes depending on the legal system (and its attitude towards GM farming).
- Regulatory framework for coexistence crucial also for ex post analysis if damage is caused.

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Thank you for your attention!

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